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No. 87-1120

In The

Supreme Court of the United States

October Term, 1987

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC., a Colorado corporation,

Appellant,

v.

THE CITY OF GREELEY, COLORADO, a municipal corporation, and HOME LIGHT AND POWER COMPANY, a Colorado corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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MOTION TO DISMISS AND SUMMARY OF ARGUMENT

COMES NOW appellee City of Greeley, Colorado, and moves this Court pursuant to Rule 16.1 of the Revised Rules of the Supreme Court of the United States to dis-

miss the above-captioned appeal. As grounds therefore, appellee respectfully submits that the appeal is not within the Court's jurisdiction in that:

1. The decision below from which appellant appeals is not a final decision as required under Section 1257 of Title 28 of the United States Code;

2. The decision below does not present a substantial federal question; and

3. The decision below rests solely on adequate state law grounds.

STATEMENT OF THE CASE

The above-captioned appeal arises from the decision of the Colorado Supreme Court entered on September 8, 1987, which reversed a trial court determination favorable to appellant Poudre Valley Rural Electric Association, Inc. ("Poudre"). In reversing the trial court's judgment, the Colorado Supreme Court ruled that Poudre must obtain a municipal franchise before it could utilize city streets or rights-of-way to expand pre-existing utility services or facilities, or to provide new services within those portions of its service area annexed to the City of Greeley. *See, City of Greeley v. Poudre Valley Rural Electric Association, Inc.*, 744 P.2d 739 (Colo. 1987).

Poudre now claims that in ruling as it did, the Colorado Supreme Court denied Poudre due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. Specifically, Poudre is alleging that

by failing to rule on various affirmative defenses sounding in federal law which were raised, but not decided in the trial court, the Colorado Supreme Court denied Poudre its "day in court" in violation of the Fourteenth Amendment. As noted in its Jurisdictional Statement, a determination on the issues upon which Poudre now seeks review was not necessary at the trial court level. (*See,* Jurisdictional Statement at page 3, para. 2.)

At present, the Colorado Supreme Court has remanded the case back to the trial court for further proceedings consistent with its ruling, where the matter rests awaiting further action.

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ARGUMENT

I. THE DECISION BELOW IS NOT A FINAL DECISION SUBJECT TO REVIEW UNDER SECTION 1257 OF TITLE 28 OF THE UNITED STATES CODE.

Section 1257 of Title 28 of the United States Code grants jurisdiction to the Supreme Court to review "final judgments or decisions rendered by the highest court of a state in which a decision could be had." This finality requirement applies to review of state court judgments brought by way of appeal or by *certiorari. San Diego Gas and Electric Co. v. San Diego,* 450 U.S. 621, 630 n. 10, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981).

It has been generally held that a judgment or decree of the highest court of a state reversing an inferior court and remanding the case to a lower court for further judi-

cial proceedings is not a final judgment and, thus, is not subject to review by the United States Supreme Court. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1914); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). This is so because such further proceedings might remove the basis or alter the nature of the federal appeal. *Minnick v. California Department of Corrections*, 425 U.S. 105, 101 S.Ct. 2211, 68 L.Ed.2d 706 (1981); *Dump Truck Owners v. Public Utilities*, 434 U.S. 9, 98 S.Ct. 251, 54 L.Ed.2d 8 (1977). Appellee respectfully submits that the above-captioned appeal does not involve the prerequisite final judgment or decree as called for in 28 U.S.C. Section 1257. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).[1]

II. THE DECISION BELOW DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A state court decision will only be reviewed by the Supreme Court if it affirmatively appears from the record that the federal question upon which review is sought was necessary to the state court determination. *Williams v. Kaiser*, 323 U.S. 471, 477, 65 S.Ct. 363, 89 L.Ed. 398 (1944). If the state court decision indicates clearly and expressly that it is based on bona fide separate, adequate, and independent grounds, review will be denied. *Michigan v. Long*, 463 U.S. 1032, 1041, 102 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The Supreme Court has no authority to review state court determinations of purely state law, nor federal issues that can have no effect on a state court's judgment. *Interna-*

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[1]This matter is set for a hearing on further proceedings before the trial court on March 11, 1988.

tional Longshoremen's Association, AFL-CIO v. Davis, 476 U.S. —, 106 S.Ct. 1904, 90 L.Ed.2d 389, 398 (1986).

The decision by the Colorado Supreme Court in this instance is entirely dependent on interpretations of Colorado state law. The opinion below makes no reference to federal case law, statute, or constitutional interpretation. *Compare, Michigan v. Long, supra.*

III. THE DECISION OF THE COLORADO SUPREME COURT RESTS SOLELY ON ADEQUATE STATE LAW GROUNDS.

Poudre has invoked this Court's appellate jurisdiction under 28 U.S.C. Section 1257(2) upon the argument that in ruling as it did, the Colorado Supreme Court upheld a local ordinance and charter provision in contravention to the Constitution and laws of the United States. A plain reading of the Colorado Supreme Court's decision does not support Poudre's argument. The Colorado Supreme Court's decision is devoid of references to federal constitutional, statutory, or case law, except for a limited illustrative reference to federal judicial interpretations of the franchise power. *See, City of Greeley v. Poudre Valley Rural Electrical Association, Inc., supra,* 744 P.2d at 744. The case below was decided solely upon clearly articulated state law grounds. To the extent appellant feels it was not afforded an adequate opportunity to argue its alleged federal defenses, its remedy is to move the trial court for further proceedings not inconsistent with the Colorado Supreme Court's decision.[2]

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[2]It should be noted that Poudre's original reference to these defenses before the Colorado Supreme Court was contained in a footnote in the concluding paragraph of its Answer Brief.

This Court should exercise its jurisdiction over state court judgments only to the extent they incorrectly adjudge federal rights. *Herb v. Pitcairn*, 324 U.S. 124, 126, 65 S.Ct. 459, 89 L.Ed. 794 (1944). The decision below rendered by the Colorado Supreme Court did not adjudicate any federal rights or issues.

CONCLUSION

The Supreme Court should not exercise jurisdiction in this case in that the decisions entered at both the trial and state court appellate levels did not involve issues, interpretations, or applications of federal law. The ruling below of the Colorado Supreme Court rests solely upon adequate and distinct state law grounds. Finally, in that further proceedings are available in this matter at the trial level, the holding of the Colorado Supreme Court from which Poudre seeks relief is not final within the meaning of 28 U.S.C. Section 1257. Poudre's appeal should be dismissed.

Respectfully submitted,
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